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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 163

NORTHWESTERN PACIFIC RAILROAD COMPANY, A CORPORATION, PETITIONER,

vs.

JOSEPHINE BOHO, AS ADMINISTRATRIX OF THE ESTATE OF PERRY E. BOHO, DECEASED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The Northwestern Pacific Railroad Company respectfully petitions this Honorable Court for a writ of certiorari to the District Court of Appeal of the

If

State of California, First Appellate District, Division One, to review a judgment of the court pronounced on January 27, 1933, reported in 19 Pac. (2d) 10 (R. 111). The said court by its judgment affirms a judgment of the lower court for damages in favor of respondent and against petitioner. Within the time specified by Rule XXX of the Supreme Court of the State of California (213 Cal. lvii), petitioner made application for a rehearing which was denied by said District Court of Appeal on the 25th day of February, 1933, and thereafter and within the time specified by said Rule XXX petitioner made application for hearing by the Supreme Court of the State of California, which was denied on the 27th day of March, 1933.

Nature of Case and Questions Involved.

This is an action brought by respondent to recover damages for the death of her husband which occurred while he was employed by petitioner in interstate commerce. The action is brought pursuant to the provisions of the statute of the United States commonly known as the Federal Employers' Liability Act. Two questions are presented:

> First. Is it not incumbent upon one claiming damages under the Federal Employers' Liability Act to establish negligence and causal connection between this and the injury?
>
> Second. Does not an employee engaged in interstate commerce assume the risk of the use of appliances, even though the same are defective, if such defective condition and the risk

incident to their use are so obvious that an ordinarily prudent person under the circumstances must have observed and appreciated them?

The Reasons Relied Upon for Allowance of a Writ of Certiorari.

Decedent was employed as a bridge tender on the railroad bridge of petitioner Northwestern Pacific Railroad Company, which bridge crosses a navigable waterway known as Petaluma Slough. His hours of employment were from 9:00 p. m. to 5:00 a. m. He came to work as usual at 9:00 p. m. on the night of February 3, 1930, and was never seen alive thereafter. Two weeks later his body was discovered in the water some miles from the bridge. There were no eye-witnesses to the accident. Respondent charged negligence by petitioner in the maintenance of a certain steel stairway running from the main deck of the bridge up to the control house in the upper portion of the span (paragraph V of complaint, R. 2), the specific charges of negligence, as shown by the testimony of respondent's witnesses (R. 31, 32, 76, 77, 79), being (1) that the steps and platform at the bottom thereof were worn smooth and were slippery when wet; (2) that a single handrail only was maintained on each side of the stairway and platform which left sufficient space so that a person falling or slipping on the stairs could slide under the handrail and into the water.

The evidence showed (R. 28, 29, 52, 63-64) that certain hairs similar to those on the sheepskin collar of a coat

worn by the decedent and a spot resembling blood were found at the edge of the platform at the bottom of the stairs. One witness also testified that there was a bruise on the back of decedent's head when the body was recovered (R. 30). This evidence it is claimed was sufficient to show that the decedent fell off the bridge at that point. *No evidence whatsoever* was introduced showing or tending to show what caused decedent to fall or that his fall was caused by any negligence on the part of his employer, if, indeed, it can be said that he did fall.

This Court has repeatedly held that one who claims under the Federal Employers' Liability Act must in some adequate way establish negligence and causal connection between this and the injury and that judgments for damages under this act may not be based upon speculation.

Atchison, Topeka & Santa Fe Railway Company v. *Saxon*, 284 U. S. 458, 52 Sup. Ct. 229, 76 L. Ed. 397;

Chicago, Milwaukee & St. Paul R. Co. v. *Coogan*, 271 U. S. 472, 70 L. Ed. 1041; 46 Sup. Ct. 564;

Atchison, Topeka & Santa Fe Railway Company v. *Toops*, 281 U. S. 351, 74 L. Ed. 896, 50 Sup. Ct. 281;

New York Central R. R. Co. v. *Ambrose*, 280 U. S. 486, 74 L. Ed. 562, 50 Sup. Ct. 198;

St. Louis-San Francisco Railway Co. v. *Mills*, 271 U. S. 344, 70 L. Ed. 979, 46 Sup. Ct. 520.

The only evidence concerning the decedent's activities on the night he disappeared was testimony that

he came to work on the bridge at 9:00 p. m. that evening, and that there was an entry in his handwriting in the log book on the bridge showing that a steamer passed through at 1:20 a. m. (R. 55). His body was not found until two weeks afterwards. What caused him to fall or jump off the bridge is unknown. It is the theory of respondent that his foot slipped on this stairs or platform and he fell off the platform at the foot of the stairway under the railing. No one can say that his fall was caused by the slippery condition of the platform or stairs or that he was precipitated into the water by reason of the absence of a lower railing, and to make such an assertion is to indulge in pure conjecture, which is what the jury was permitted to do here. It might be said with equal force that he was attacked with a fainting spell or became dizzy or fell due to some act of his own not connected with the slippery condition of the stairs. The theory of respondent and the verdict of the jury are based solely on guesswork.

The decision of the District Court of Appeal of the State of California on this point is not in accord with the decisions of this Court in the aforementioned cases. We most respectfully assert that this petition should be granted in order that there be uniformity of decision under this Federal statute. It is submitted that to permit the California decision to stand would cause confusion and uncertainty in future actions in California under this statute.

The decision of the District Court of Appeal of the State of California is also not in accord with the applicable decisions of this Court on the question of

assumption of risk. As hereinbefore set forth, it is the claim of respondent that the negligence of petitioner consisted in maintaining a stairway and platform which were slippery when wet and in not providing more than a single handrail around the same. Although it is true that the decedent only worked at night, it is further admitted that in the course of his duties for a period of more than six months before his death he was compelled to ascend and descend this stairway several times each night when the steps were slippery (R. 44-45, 47), and that in order to perform his duties as bridge tender it was necessary for him to carry a lantern or flashlight with him (R. 60). Clearly the claimed defects, to wit, the slippery surface of the stairway and the absence of secondary railings, were plainly apparent to the decedent, and the risks incident to their use were such as could have been comprehended by a person of the most limited intelligence. Under similar circumstances, this Court has held that the employee assumes the risk of the use of such appliances.

Seaboard Air Line Railway v. *Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635.

Brief.

A brief in support of this petition is filed herewith.

Prayer.

Wherefore, your petitioner prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the District Court of Appeal of the State of California, First Appellate District, Divi-

sion One, commanding said court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the records and all proceedings in the case numbered and entitled in said Court: "No. 8209, Josephine Bobo, as Administratrix of the Estate of Perry E. Bobo, deceased, plaintiff and respondent, v. Northwestern Pacific Railroad Company (a corporation), defendant and appellant", to the end that said case may be reviewed and determined by this Court as provided by law, and that said judgment of said District Court of Appeal of the State of California may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just.

Dated: San Francisco, May 11, 1933.

W. H. ORRICK,
R. W. PALMER,
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 163

NORTHWESTERN PACIFIC RAILROAD COMPANY, A CORPORATION, PETITIONER,

vs.

JOSEPHINE BOBO, AS ADMINISTRATRIX OF THE ESTATE OF PERRY E. BOBO, DECEASED, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The decision of the California court is not in accord with the applicable decisions of this Court in that no causal connection was established in this case between the alleged negligence of petitioner and the death of decedent.

Under the decision of the District Court of Appeal of the State of California, respondent is permitted to recover damages under the Federal Employers' Liability Act without establishing negligence and causal

connection between the negligence and the death of decedent.

In *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Coogan*, 271 U. S. 472, 46 Sup. Ct. 564, 70 L. Ed. 1041, this Court, speaking through Mr. Justice Butler, says, at page 1043:

> "By the Federal Employers' Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation by rail; and all State laws upon that subject were superseded. Second Employers' Liability Cases (*Mondou* v. *New York, N. H. & H. R. Co.*) 223 U. S. 1, 55, 56 L. Ed. 327, 348, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 167, 1 N. C. C. A. 875; *Seaboard Air Line R. Co.* v. *Horton*, 233 U. S. 492, 501, 58 L. Ed. 1062, 1068, L. R. A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834. The rights and obligations of the petitioner depend upon that act and applicable principles of common law as interpreted by the Federal courts. *The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act; and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish is not subject to the control of the several States. This Court will examine the record, and if it is found that as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed. St. Louis, I. M. & S. R. Co.* v. *McWhirter*, 229 U. S. 265, 277, 57 L. Ed. 1179, 1186, 33 Sup. Ct. Rep. 858; *New Orleans & N. E. R. Co.* v. *Harris*, 247 U. S. 367, 371, 62 L. Ed.

1167, 1170, 38 Sup. Ct. Rep. 535; *New Orleans & N. E. R. Co.* v. *Scarlet*, 249 U. S. 528, 63 L. Ed. 752, 39 Sup. Ct. Rep. 369." (Italics ours.)

The record in this case is short and the evidence without conflict. The testimony upon which respondent relies in support of the allegations of negligence merely proved that the surface of the steps and platform of the steel staircase had been worn smooth and that the tops of the small iron knobs thereon had also been worn somewhat and were also smooth; that as a result of this smoothness the stairs and platform when wet were slippery (R. 31, 32, 76, 77, 79). It was further established that nearly every night in the winter time the stairs were wet with dew (R. 46), although there is no proof that the stairs were wet on the night decedent was last seen upon the bridge (R. 45). It was further charged that in other industries it was considered proper for stairways of this character to have double rails or even a toe board along the sides of the steps or platform (R. 78 79). No one can say at what time or in what manner decedent fell or jumped from the bridge. It is left to conjecture whether he was seized with a dizzy spell or tripped or was caused to fall by some act of his own not connected with the slippery condition of the steps.

This Court has repeatedly granted petitions for certiorari after decision by State courts on this identical question and has adhered to the rule that the evidence must, in some adequate way, establish the negligence and causal connection between this and the injury.

The identical situation is presented here as that passed upon by this Court in *Atchison, Topeka & Santa Fe Railway Co.* v. *Saxon*, 284 U. S. 458, 52 Sup. Ct. 229, 76 L. Ed. 397, and *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Coogan* (*supra*). In the former, the Court speaking through Mr. Justice McReynolds, in 76 L. Ed. at page 398, says:

> "While employed as head brakeman by petitioner Railway Company and engaged in interstate commerce, J. W. Moore sustained fatal injuries at a New Mexico station. His personal representative obtained a judgment for damages, under the Federal Employers' Liability Act, in a Texas court.
>
> "The court of Civil Appeals at El Paso reversed this, holding that the evidence failed to show the accident resulted from the carrier's negligence. The Supreme Court granted a writ of error, reversed the Court of Civil Appeals and affirmed the original judgment. It concluded that, viewing all the evidence, there was enough to show negligence and causal connection between this and the death.
>
> "The matter is here by certiorari. The Railway sets up a claim under the federal statute which it has not heretofore had opportunity to submit for adjudication to any federal tribunal. The cause is one of a peculiar class where we have frequently been obliged to give special consideration to the facts in order to protect interstate carriers against unwarranted judgments and enforce observance of the Liability Act as here interpreted.
>
> "Examination of the record convinces us that the Court of Civil Appeals reached the proper conclusion. We can find no evidence

from which it may be properly concluded that Moore's tragic death was the result of negligence by the Railway Company. As often pointed out, one who claims under the Federal Act must in some adequate way establish negligence and causal connection between this and the injury. *New York, C. R. Co.* v. *Ambrose*, 280 U. S. 486, 74 L. Ed. 562, 50 S. Ct. 198; *Atchison, T. & S. F. R. Co.* v. *Toops*, 281 U. S. 354, 74 L. Ed. 899, 50 S. Ct. 284.

"In the language of the Supreme Court the respondent 'recovered in the trial court on the theory that the deceased, while in the discharge of his duties as a brakeman, was running along by the side of the track of the Railway Company and while doing so with the purpose and intent of boarding one of the cars in the train, he stepped on or upon some soft area or hole in his pathway, and was thereby caused to fall and be run over and killed' (Tex.) 36 S. W. (2d) 230.

"Nobody saw the accident; no one can say with fair certainty how it occurred. Consistently with the facts disclosed, it might have happened in one of several ways and without causal negligence by the petitioner. When last seen the deceased was running westwardly by the side of the train then moving in that direction. Across the pathway commonly used by trainmen, there was a slight depression—estimated to be four or five, or possibly six or eight, feet long and three feet wide—filled with small rock screenings. It was softer than other portions of the way—yielded to the foot. Eight or ten feet west of this witnesses found blood upon the rail.

"Two hours after the accident a fourteen year old boy discovered the mark of a shoe in the screenings. He said it 'was deeper than the footprint that I made, it looked as though somebody that was heavy or running had stepped in it. The front part of the foot was deepest.' There is no evidence nothing but conjecture to show that the deceased made this impression; and, even if he did, we cannot assume that by stepping there he was made to stumble and fall under the moving train.

"What occasioned this distressing accident can only be surmised. It was necessary to show causal negligence in order to establish the respondent's right to recover. The evidence fails to meet this requirement.

"The judgment below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion."

In *Chicago, Milwaukee & St. Paul Railroad Co.* v. *Coogan* (*supra*), the evidence showed that there was a bent or loosened pipe alongside of the defendant's railroad tracks at a point where the decedent was required to go to uncouple some cars. In some way while uncoupling the cars the decedent fell under the wheels and was killed. It was the contention of the plaintiff that the decedent slipped or tripped over the bent pipe and fell under the wheels. It was claimed that the defendant was negligent in so maintaining such a pipe alongside its tracks and that such negligence proximately caused the death of decedent. To support this contention a mark on the outside of decedent's shoes was displayed for the purpose of at-

tempting to show that he slipped upon the pipe. This Court, at page 566, says:

> "The case was tried, and respondent supports the judgment, on the theory that, when the switch engine stopped after the last coupling, deceased went between the caboose and car to couple the air hose; that he stepped between the rails with his right foot, leaving his left foot outside the south rail and between it and the pipe line; that, stooping to reach the air hose his left foot slipped backward under the bent pipe; that, before he had time to make the coupling, the cars were started backward in the movement to clear the switch; that, when he attempted to straighten up, his left foot was caught under the pipe, and he was forced backward, run over, and killed. It follows that, unless the evidence is sufficient to warrant a finding that the death resulted from the catching of deceased's left foot under the bent part of the pipe line the judgment cannot be sustained. As there is no direct evidence, it is necessary to determine whether the circumstances are sufficient to warrant a finding of that fact. *Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved and not themselves presumed. United States* v. *Ross*, 92 U. S. 281, 284, 23 L. Ed. 707; *Manning* v. *Insurance Co.*, 100 U. S. 693, 698, 25 L. Ed. 761. Assuming it was the duty of deceased to couple the air hose, it was necessary for him to go between the cars to do so. He was standing by the caboose when the first cut came in. The air hose coupling might have been made then or at any time after that. It was not made, and it is left to be inferred

that he postponed effort in that direction until after all the switching had been done and until the engine had hold of the string of cars. And then it must be inferred that he went between the cars in the manner claimed—his right foot between the rails, leaving his left foot outside, where, it is argued, it was caught under the bent pipe.

"The 'rounding depression' on the counter of the shoe is not sufficient to bridge the hiatus in the evidence. It is not shown when or how that depression was made. The condition of the shoe before the accident is not disclosed. A number of days elapsed before it was noticed, and it is not shown that in the meantime care was taken to keep it in the same condition or that the depression was not made after the accident. Even if the appearance of the shoe and other circumstances are sufficient to justify an inference that the depression might have been made by the bent pipe, it cannot be said that they constitute any reasonable support for a finding that it was so made. And, assuming that the depression on the shoe counter was made by contact with the bent pipe, there is nothing to indicate whether it was made at the time deceased was knocked down, or later while he was being dragged. But there is nothing to show that the pipe had any connection with the accident. * * *

"When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner the contention of respondent that the bent pipe caused or contributed to cause the death is without any substantial support. The

record leaves the matter in the realm of speculation and conjecture."

In each of the foregoing cases there were no eye-witnesses to the accident and what actually caused the decedent to fall was unknown. There was the testimony relative to the footprint in the soft ground in the Saxon case and the mark on the shoe of the decedent in the Coogan case and it was claimed that this evidence was sufficient to show that the decedent in the Saxon case was caused to fall under the cars by reason of the soft ground, and in the Coogan case by reason of the bent pipe alongside the tracks. In the case at bar there is only the testimony relative to the sheep hairs, alleged blood spot and bruise on decedent's head and the single handrail to support the claim that he was caused to fall into the water by the slippery condition of the stairs and the absence of a lower railing. We see no distinction between these three cases. In each case it might be surmised that the decedent was caused to fall by the alleged negligent act of his employer, but this Court has repeatedly held that a judgment under this act cannot be supported solely by surmise and speculation.

The California District Court of Appeal has said in its decision (R. 114) that the evidence was reasonably sufficient to show that the condition of the stairway and platform rendered their use unsafe at night and that the physical facts fairly supported the conclusion that decedent fell therefrom and his body passed under the railing into the water. In so holding, the decision of the California court does not meet the

requirements laid down by this Court in such an action. Not only was it incumbent on respondent to prove that the steps were unsafe, due to their slippery condition and single rail, but it was necessary to prove that the fall and death of decedent were proximately *caused* thereby.

In *Atchison, Topeka & Santa Fe Railway Co.* v. *Toops,* 281 U. S. 351, 50 Sup. Ct. 281, 74 L. Ed. 896, Mr. Justice Stone, at page 899, says:

> "But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer. *Patton* v. *Texas & P. R. Co.*, 179 U. S. 658, 45 L. Ed. 361, 21 Sup. Ct. Rep. 275; *New Orleans & N. E. R. Co.* v. *Harris,* 247 U. S. 367, 371, 62 L. Ed. 1167, 1170, 38 Sup. Ct. Rep. 535; *St. Louis-San Francisco R. Co.* v. *Mills,* 271 U. S. 344, 347, 70 L. Ed. 979, 983, 46 Sup. Ct. Rep. 520; *Chicago, M. & St. P. R. Co.* v. *Coogan,* 271 U. S. 472, 70 L. Ed. 1041, 46 Sup. Ct. Rep. 564; *New York C. R. Co.* v. *Ambrose,* decided February 24, 1930 (280 U. S. 486, *ante,* 562, 50 Sup. Ct. Rep. 198).
>
> "Even though we assume that in all the respects alleged the petitioner was negligent, the record does not disclose any facts tending to show that the negligence was the cause of the injury and death."

The decision of the Californa court on the question of assumption of risk is contrary to the rule laid down by this Court with respect to such defense under the Federal Employers' Liability Act.

In *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, at 1070, the United States Supreme Court says:

> "On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, *unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.*"

The evidence shows that although decedent was only employed at night he had been working on the bridge

continuously for six months before the accident; that his duties there were to open and close the bridge to permit boats to pass through; that in order to permit a boat to pass through it was necessary for him to traverse this stairway four times (R. 43-45). The testimony shows that when a boat whistled to go through the bridge the operator had to go up the stairs to the engine house on the top of the bridge and throw the semaphores and open the bridge. He then had to go down the stairs and go to each end of the draw and see that the rails were in proper alignment. He then had to return up the stairs to the engine room, throw the semaphores to permit the trains to cross the bridge and then descend the stairs to reach the little house where he customarily remained. The testimony further showed that it was necessary for the operator to have either a lantern or a flashlight to accomplish this work, and that lanterns in good condition were furnished by the company for this purpose (R. 60-61). Clearly, therefore, the decedent had gone up and down this stairway hundreds of times before the night of the accident, during all of which time he carried a lantern or a flashlight. The stairs were somewhat steep and it was customary to hold on to the railing in going up or down them. How can it possibly be said that any person of the most limited intelligence would not have observed and known that there was only one railing on the stairs and platform. The decedent was a man of ordinary intelligence. The ordinary knowledge and experience in human affairs tells us without any question that he could not have traversed this stairway hundreds of times in the course of his duty

without being aware of its physical characteristics. The same is true of the alleged slippery condition of the stairs. The testimony discloses that the stairs were slippery when wet. There is no evidence, however, that the stairs were wet at the time Bobo fell off the bridge. The testimony further discloses that nearly every night during the winter dew collected on the stairs rendering them slippery (R. 47). No one certainly could have been more aware of this condition than the decedent. His hours of duty were from 9:00 p. m. to 5:00 a. m. and he was in a better position to observe the wetness of the steps than any one else. Having gone up and down these stairs hundreds of times at night with a lantern and with his hand on the rail and with his feet on the alleged wet and slippery steps, it is to do violence to sound judgment or ordinary human experience to say that he was not aware of the fact that the stairs when wet were slippery and the danger incident thereto.

The California court in passing on this question in its decision (R. 114) merely says:

> "While it is the rule under the statute that an experienced employee who knows the material conditions must be considered as appreciating the danger and assuming the risk, although at the time he may have forgotten the existence of the danger and the employer was negligent in allowing the danger to remain (*Jacobs* v. *Southern Ry. Co.*, 241 U. S. 229), here, so far as shown, decedent had never ascended the stairway during the day time, nor was he aware of the conditions which made the structure dangerous."

The court wholly ignores the rule that where the conditions and the risk are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them, the employee is deemed to assume the same.

Respectfully submitted,

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Attorneys for Petitioner.

(3453)